Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings in the court of appeals are listed in the caption of this petition. Lieutenant Governor Mazie K. Hirono, although listed in the caption of the court of appeals' opinion, was not a party to the proceedings in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harold F. Rice respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 146 F.3d 1075. The opinion of the district court (App., *infra*, 19a-43a) is reported at 963 F. Supp. 1547.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1998. A petition for rehearing was denied on August 20, 1998. App., *infra*, 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution, the Constitution of the State of Hawaii, the Hawaii Admission Act, and the Hawaii Revised Statutes are reproduced at App., *infra*, 45a-55a.

STATEMENT OF THE CASE

This case involves a challenge under the Fourteenth and Fifteenth Amendments to an explicit racial restriction limiting the right to vote in statewide elections for the board of trustees of the Office of Hawaiian Affairs (OHA). The State of Hawaii limits the right to vote in such elections to the descendants of the races that inhabited the Hawaiian Islands before 1778. Haw. Rev. Stat. §§ 10-2, 13D-3. The United States Court of Appeals for the Ninth Circuit held that this facially race-based classification is subject only to rational basis review because

of the existence of a purported "trust relationship" between certain descendants of the favored race and the state and federal governments. Moreover, according to the court of appeals, this explicit racial restriction on voting would survive strict scrutiny in any event, because the very existence of a legislatively declared "public trust" or "special relationship" benefiting the favored race creates a compelling governmental interest in enhancing the electoral power of that racial group through a racially segregated electoral system.

This stunning chain of reasoning provides a road map for the wholesale circumvention of the Fourteenth and Fifteenth Amendments. Under the Ninth Circuit's holding, whenever a state legislature wishes to circumvent the Civil War Amendments and enact a racial preference, it need only preface the discriminatory legislation with a legislative designation of the preferred group as the beneficiary of a "public trust" or a "special relationship" with the government. Review of this decision is necessary in order to overturn this pernicious doctrine and reaffirm that *all* race-based restrictions on the right to vote are forbidden by the Fifteenth Amendment and that *all* governmental classifications based on race are subject to the strictest judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

1. OHA was established by Article XII, Section 5 of the Hawaiian Constitution in 1978. It is an agency of the State of Hawaii created to provide public assistance and support to two classes of persons defined solely by race: "[n]ative Hawaiian[s]" (defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778") and "Hawaiian[s]" (defined as "any descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in

Hawaii").[1] Haw. Rev. Stat. § 10-2. OHA was created to provide a wide range of governmental services to these two racial classes of Hawaiian citizens, including identifying "physical, sociological, psychological and economic needs," organizing and implementing programs to meet those needs, and interacting as an independent state agency with federal and private entities and with other state agencies. Haw. Rev. Stat. §§ 10-6, 10-4; *see also* 1996-97 OHA Biennial Report 10-33 (describing broad range of OHA programs and services, including health and human services such as funding for "traditional Hawaiian" health and healing practices and the promotion of information and access to affordable medical and social programs; grants and programs to promote traditional "Hawaiian" culture; advocacy for individual and general rights of "Hawaiians" to land and natural resources; economic development programs such as loans and grants; educational programs such as grants and programs for gifted and talented "Hawaiian" children; and housing assistance such as low-interest loans).

OHA oversees two separate funds, each administered on racial grounds. The first is composed primarily of legislative appropriations from general tax revenues that are managed and administered by OHA as a "trust" for both "native Hawaiians" and "Hawaiians." Haw. Const. art. XII, § 5. OHA expends these funds for the benefit of all descendants of the races inhabiting the islands before 1778, without regard to blood quantum. 1993-94 OHA Biennial Report 5. The second trust, which comprises the vast majority of OHA funds, consists of a state-determined portion (currently 20 percent) of the receipts from a public lands trust transferred from the federal government to the State of Hawaii by the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), and

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[1] The 1778 date reflects the first known European contact with the Hawaiian Islands.

continued under the authority of the State of Hawaii by Article XII, Section 4, of the Hawaiian Constitution. *See* Haw. Rev. Stat. § 10-13.5 (setting 20 percent allocation). Unlike the appropriations from the Hawaiian legislature, which are expended on behalf of *both* racial groups (*i.e.*, "Hawaiians" and "native Hawaiians"), the annual public land receipts can be expended only for the sole benefit of "native Hawaiians," meaning those descendants of the pre-1778 races who also pass the 50 percent blood quantum test. *See* 83-2 Haw. Att'y Gen. Op., 1983 WL 41853 (April 15, 1983) (directing OHA to use funds derived from ceded lands to better conditions of only "native Hawaiians," not "Hawaiians"); *see also* 1993-94 OHA Biennial Report at 5 (setting forth OHA's policy of limiting beneficiaries to those with 50 percent or more native blood whenever a project is funded solely by ceded land proceeds, but opening class of beneficiaries to all descendants of pre-1778 inhabitants if ceded lands funds are matched by funds appropriated by the state legislature or other sources).[2] Within these parameters, OHA trustees have broad discretion in administering these funds. *See* 1993-94 OHA Biennial Report at 5 ("Although OHA is technically part of the Hawai'i state government, it operates as a semi-autonomous entity. It

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[2] OHA has been sued repeatedly by litigants arguing that it improperly gives benefits to individuals who, though racially "Hawaiian," do not meet the 50 percent blood quantum requirement. *See, e.g., Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990) (allowing 42 U.S.C. § 1983 suit by native Hawaiians against OHA trustees claiming trustees were spending ceded land proceeds for purposes other than the benefit of "native Hawaiians"); *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986) (upholding the statutory definition of "Hawaiians" against claim by "native Hawaiians" that definition improperly expanded class of intended beneficiaries and violated equal protection by distributing benefits without regard to blood quantum).

is run by nine trustees, all Hawaiians elected by Hawaiians. Its operating budget is approved by the state legislature, but trustees have discretion over trust funds.").[3]

Although the ceded land trust has its origin in federal law, the OHA race-based regime, and in particular the racial voting restriction for OHA elections, is entirely a creature of state law. As a result of the Annexation Act of 1898, 30 Stat. 750 (1898), pursuant to which the Republic of Hawaii became a United States possession, roughly 1,800,000 acres of previously crown, government, and public lands in Hawaii were ceded to the United States. The Annexation Act provided that all revenues from these public lands were to "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* The Organic Act, passed in 1900, established the Territory of Hawaii and confirmed that the public lands ceded to the United States would remain in the possession of the government of the Territory for public works and other public purposes. Organic Act of 1900, ch. 339, § 91, 31 Stat. 141 (1900).

Hawaii became a State in 1959. Hawaii Admission Act, 73 Stat. 4. The Hawaii Admission Act conveyed the ceded public lands to the new State of Hawaii, and provided that these public lands would be held by the State as a "public trust" for five general purposes: "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible, [4] for the making of

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[3] The amount of funds controlled by OHA is staggering. For example, as of the end of fiscal year 1997, OHA controlled a total fund balance in excess of $232,000,000. 1996-97 OHA Biennial Report, Independent Auditors' Report 10.

public improvements, and [5] for the provision of lands for public use." *Id.* at § 5(f).

Hawaii was given complete discretion to choose from among the five stated purposes in administering the trust. Hawaii. Admission Act, § 5(f) ("Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide."). From 1959 until the creation of OHA in 1978, the ceded land trust was administered in race-neutral terms for the benefit of all Hawaiian citizens, with most of the proceeds going to the Hawaii Department of Education. App., *infra*, 5a; 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

Article XII, Section 5, of the Hawaiian Constitution requires that the members of the board of trustees of OHA "shall be Hawaiians" and are to be "elected by qualified voters who are Hawaiians, as provided by law." The implementing statute, Haw. Rev. Stat. § 13D-3(b), similarly provides that "[n]o person shall be eligible to register as a voter for the election of [OHA] board members unless the person . . . is Hawaiian." In each case, "Hawaiian" is defined exclusively in terms of race and ancestry: descendants of the pre-1778 races inhabiting the Hawaiian Islands. App., *infra*, 6a.

2. Petitioner was born and currently lives in Hawaii as a citizen, taxpayer, and qualified elector of the United States, the State of Hawaii, and the County of Hawaii. Petitioner's family has lived in Hawaii since the nineteenth century. Petitioner, however, does not satisfy the racial requirements for "native Hawaiian" or "Hawaiian" established by the State of Hawaii.

In March 1996, petitioner applied to vote in the August 1996 election for trustees of OHA. The registration form contained the following declaration: "I am

also Hawaiian and desire to register to vote in OHA elections." App., *infra,* 6a-7a.[4] Petitioner crossed off the phrase "am also Hawaiian and" and marked "yes" on the application. Although petitioner meets all other requirements for voting except the racial requirement, the State denied his application. *Id.* at 7a.

3. Petitioner filed suit in the United States District Court for the District of Hawaii, contending that he had been denied his right to vote in elections for trustees of OHA because of his race, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution. App., *infra*, 9a, 19a. In his Second Amended Complaint, petitioner sought a declaratory judgment that the race-based voting qualification violated the Fourteenth and Fifteenth Amendments. *See* App., *infra*, 7a, 21a.

4. On May 6, 1997, the district court entered summary judgment against petitioner. App., *infra*, 19a-43a. The district court concluded that the United States and the State of Hawaii had undertaken a special relationship with the descendants of the peoples that inhabited the Hawaiian Islands before 1778. Relying on *Morton v. Mancari*, 417 U.S. 535 (1974), the court held that the State's restriction on the franchise to individuals with Hawaiian blood was not a racial distinction, but a "political" one, subject only to rational basis scrutiny. Applying such minimal scrutiny, the court concluded that the OHA voting limitation was reasonably related to Hawaii's obligation to fulfill its trust responsibility to the descendants of the races inhabiting the islands before 1778. In addition, the court concluded that limiting the right to vote for OHA trustees to the beneficiaries of the trust was a rational restriction, and that the OHA election

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[4] It is undisputed that the reference to "Hawaiian" on this form did not encompass all Hawaiian citizens, but was instead limited to racial "Hawaiians."

was a "special interest" election within the meaning of *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

5. The court of appeals affirmed. App., *infra*, 1a-18a. Although the court conceded that "the Hawaiian Constitution and Haw. Rev. Stat. § 13D-3 contain a racial classification on their face" and that the voting requirements were "clearly racial," it nonetheless upheld the classification under *Salyer* as a "rational" restriction limiting eligible voters in a "special purpose[ ]" election to those most affected by the limited jurisdiction of the agency in question. App., *infra*, 12a-16a. The court reasoned that "elections may be held for special purposes and voter qualifications that might otherwise be invalid may survive when they limit eligible voters to those who are disproportionately affected and the government agency does not perform fundamentally governmental functions." *Id.* at 12a.

The court also relied heavily on *Mancari* for the proposition that the classification was primarily "political" rather than racial and subject only to rational basis review. The court of appeals recognized, however, that "Hawaiians are not exactly like Indians (for example, they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution)." App., *infra*, 14a. Nonetheless, the court concluded that it was not compelled "to invalidate the voting restriction simply because it appears to be raced-based without also considering the unique trust relationship that gave rise to it." *Id.* In fact, the court of appeals, like the district court, read *Mancari* as holding that rational basis scrutiny applies whenever the classification at issue reflects a "trust relationship" with an identifiable class, regardless of the racial quality of the distinction or whether the people so classified are recognized as a quasi-sovereign tribe. Because "the special treatment of Hawaiians and native Hawaiians" involved "the establishment of trusts for their benefit . . . similar to the

special treatment of Indians . . . approved in *Mancari*," the court of appeals reasoned, the voting restrictions on OHA trustee elections involve a "political rather than a racial classification, even though racial criteria may be used in defining eligibility." *Id.*[5]

The court of appeals next concluded that this explicitly racial voting requirement passed rational basis review, noting that "[w]e have no trouble understanding why Hawaii would want the people who have an interest in the trust to vote for trustees, and it is rational for the state to make this decision in light of its trust responsibilities for Hawaiians and native Hawaiians." App., *infra*, 17a. The court then went on to hold that Hawaii's racial voting restriction also survived even strict scru-

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5 In addition, the court of appeals characterized petitioner's challenge as limited to the denial of his right to vote and not specifically aimed at the existence of OHA, the racial composition of its board of trustees, or the original land set-aside for the benefit of native Hawaiians and Hawaiians. As a result, the court stated that it felt itself obligated to assume that these racially discriminatory programs were both constitutional and of the utmost importance. App., *infra*, 9a ("If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."). Having thus assumed away the naked racial classification, the court then restated the issue as simply whether trustee elections can legitimately be limited to the beneficiaries of the trust. Thus, the court recharacterized what it had earlier recognized as the "clearly racial" voting restriction as "not primarily racial, but legal or political." *Id.* at 10a.

tiny. *Id.* at 17a-18a. According to the court of appeals, Hawaii has a "compelling" interest in "honor[ing] the trust," and "the restriction on voter eligibility is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties' would be the best way to insure proper management and adherence to the needed fiduciary principles." *Id.* at 17a.

REASONS FOR GRANTING THE WRIT

In its decision below, the Ninth Circuit has distinguished away a century of this Court's constitutional equal protection and voting rights jurisprudence in order to uphold a broad and patently offensive regime of racially segregated voting in the State of Hawaii. Despite its recognition that the state laws implementing the OHA voting restriction "contain a racial classification on their face," the court of appeals distorted beyond recognition two unrelated doctrines -- the *Mancari* Court's recognition of the "special relationship" between the United States and members of formally recognized Indian tribes, and the *Salyer* Court's creation of a "special purpose election" exception to the Fourteenth Amendment's one-person-one-vote requirement -- to hold that the purely racial classifications of "Hawaiian" and "native Hawaiian" do not violate the clear and unambiguous prohibitions of the Fifteenth Amendment and are subject only to minimal rational basis review under the Equal Protection Clause. Compounding the damage wrought by its decision, the court of appeals then went on to hold in the alternative that even if strict scrutiny does apply, the State enjoys a "compelling" interest in ensuring that only the racially defined beneficiaries of Hawaii's racial preferences can participate in electing the trustees who administer this racial spoils system.

In following this tortured course to its erroneous conclusion, the court of appeals has created conflicts with numerous decisions of this Court and has introduced new and pernicious loopholes into the previously

clear rules laid down by this Court under the Fourteenth and Fifteenth Amendments. Until now, there was no room for doubt that, under this Court's precedents, race-based election laws are strictly forbidden by the Fifteenth Amendment and state-mandated racial classifications are subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The decision below constitutes a direct challenge to the clarity of this Court's pronouncements in this area, suggesting that any time a state legislature wishes to circumvent the Civil War Amendments and enact a racial voting restriction or preference, it need only preface the discriminatory legislation with the creation of a "public trust" or "special relationship" on behalf of the preferred group.

The court of appeals' stunning departure from settled legal principles announced by this Court threatens to undermine the single most important legal principle announced by our Constitution and by the decisions of this Court: that government-sponsored racial discrimination will not be tolerated in American society. Because of the magnitude of the Ninth Circuit's errors and their troublesome impact on voting rights and equal protection jurisprudence, this Court's review is warranted.

I. The Court Of Appeals' Holding That The Fifteenth Amendment Does Not Apply To Statewide Elections For Limited-Purpose Offices Is Irreconcilable With Decisions Of This Court

Despite the plain terms of the Fifteenth Amendment and more than a century of this Court's jurisprudence to the contrary, the court of appeals held that the Fifteenth Amendment does not apply to all statewide elections for public office. Rather, the court held that the "special purpose election" exception to the Fourteenth Amendment's one-person-one-vote rule also limits the scope of the Fifteenth Amendment's prohibition of race-based election laws. App., *infra*, 12a, 14a-16a. That

striking and unprecedented holding finds no support in the text or history of the Fifteenth Amendment, and it is flatly contradicted by several decisions of this Court.

A. The Fifteenth Amendment Applies To All Elections Of Public Officials

The Fifteenth Amendment's command is clear: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race . . . ." U.S. Const. amend. XV, § 1. The prohibition of race-based voting restrictions is absolute; the Amendment contains no exceptions, and this Court has not created any. *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980); *Guinn v. United States*, 238 U.S. 347, 362-63 (1915) ("[I]t is . . . beyond the possibility of question that the [Fifteenth] Amendment in express terms restricts the power . . . to abridge or deny the right . . . to vote on account of race . . . . [T]he command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed."). As this Court explained in *United States v. Reese*, 92 U.S. 214, 218 (1875), the Fifteenth Amendment "has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude." *See also United States v. Cruikshank*, 92 U.S. 542, 555-56 (1875) (observing that "exemption from discrimination in the exercise of [the right of suffrage] on account of race," rather than the suffrage itself, is "a necessary attribute of national citizenship"); *Terry v. Adams*, 345 U.S. 461, 467 (1953) ("The [Fifteenth] Amendment bans racial discrimination in voting by both state and nation.").

Equally clear is that the Fifteenth Amendment's prohibition of race-based voting laws applies to *all* elections for public officials. "Clearly, the [Fifteenth] Amendment *includes any election in which public issues are decided or public officials selected*." *Terry*, 345 U.S. at 468 (emphasis added); *see also Grey v. Sanders*, 372 U.S. 368, 380 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections."); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) ("[T]he Fifteenth Amendment specifically interdicts *any denial* or abridgment by a State of the right of citizens to vote on account of color.") (emphasis added).

That the Fifteenth Amendment applies to all elections for public officials is further confirmed by Section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), which this Court has noted "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 392 (1991); *accord City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). As originally enacted, Section 2 provided that "[n]o voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision to deny or abridge the right . . . to vote on account of race or color." 79 Stat. 437.[6] As this Court observed in *Chisom*, "Section 2 protected the right to vote, and it did so *without making any distinctions or imposing any limitations as to which elections would fall within its purview*." 501 U.S. at 392 (emphasis added). Indeed, the Court quoted with approval the statement of Attorney General Katzenbach that "'[e]very election in which registered electors are permitted to vote would be covered' under § 2." *Id.* (quoting Hearings on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitution of the United States before Subcomm. No. 5 of the House

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6 Section 2 was amended in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, as required for a violation of the Amendment itself. *See Chisom*, 501 U.S. at 391-96.

Comm. on the Judiciary, 89th Cong., 1st Sess., 21 (1965)); *see also id.* at 405 (Scalia, J., dissenting) ("I agree with the Court that the original legislation, directed toward intentional discrimination, applied to all elections, for it clearly said so.").

Thus, the court of appeals' unprecedented narrowing of the Fifteenth Amendment, and in particular its conclusion that "this isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis" (App., *infra*, 15a), directly conflict with the plain language of the Fifteenth Amendment and with this Court's case law. Rather than being an example of a hitherto undiscovered category of racially preferential election laws that fall outside the scope of the Fifteenth Amendment, the OHA election laws are instead precisely the type of race-based voting restrictions that the Fifteenth Amendment forbids. *See, e.g., Lane v. Wilson*, 307 U.S. 268, 275 (1939) ("The Amendment nullifies sophisticated as well as simple-minded modes of discrimination."); *Neal v. Delaware*, 103 U.S. 370, 389 (1880). The Ninth Circuit's creation of a clear exception to the unambiguous mandate of the Fifteenth Amendment is irreconcilable with this Court's Fifteenth Amendment jurisprudence and compels further review.

B. The *Salyer* "Special Purpose Election" Exception Does Not Restrict The Scope Of The Fifteenth Amendment

In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), this Court held that an election for a governmental body that serves a "special limited purpose" and whose decisions "disproportionate[ly] [a]ffect" a limited group of landowners may be limited to that group of landowners without violating the one-person-one-vote mandate of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 728; *see also Ball v. James*, 451 U.S. 355 (1981) (upholding constitutionality of an Arizona

system for electing directors of agricultural improvement and power district that limited voter eligibility to landowners and apportioned voting power according to number of acres owned).

The Ninth Circuit below held that the scope of OHA's responsibility to deliver governmental support services to racial "Hawaiians" satisfies the "special limited purpose" prong of *Salyer*, and that the effects of OHA's services were sufficiently focused on those individuals to satisfy the "disproportionate effect" prong. App., *infra*, 13a, 15a-16a. Although the court of appeals "recognize[d] that the [OHA] qualification has to do with race instead of ownership of land, as in *Salyer*," it nonetheless relied on *Salyer* in concluding that the OHA election "isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." *Id.* at 13a, 15a.

Thus, the court of appeals has expanded *Salyer* from a narrow exception to the one-person-one-vote rule of the Fourteenth Amendment into a broad exception to the previously strict prohibitions against racial discrimination announced by the Fourteenth and Fifteenth Amendments. This dramatic expansion of the *Salyer* doctrine would shield from close scrutiny any racial restriction on access to the ballot box, so long as those who are permitted to vote are the special objects of attention of the limited-purpose government body for whom they are voting. Indeed, under the Ninth Circuit's reasoning, if the governing body for which elections are held is charged with targeting benefits and services to a particular racial group, there is seemingly no limit to the number or types of racial voting restrictions a State can employ. Nothing in *Salyer* or its progeny authorizes this transmogrification of the race-neutral *Salyer* doctrine into an excuse for government-sponsored racial discrimination in voting.

The court of appeals' decision also conflicts with *Salyer* by extending the "special limited purpose" exception to a state agency that expends general tax revenues. Because a substantial portion of the funds in OHA's "trusts" comes from the general taxes paid by all citizens of Hawaii, *see, e.g.*, 1997 Haw. Sess. L., Act 240 (appropriating millions of dollars of general tax proceeds to OHA for fiscal years 1997-1999), the court of appeals has forsaken the "disproportionate effect" prong of *Salyer*. *See Salyer*, 410 U.S. at 727 (distinguishing and disapproving lopsided voting schemes in which "those persons excluded from voting . . . contributed both directly through local taxes and indirectly through increased rents"); *Kessler v. Grand Central Dist. Management Ass'n, Inc.*, 158 F.3d 92, 107 (2d Cir. 1998) (applying *Salyer* to a Manhattan business improvement district because "[d]istrict residents . . . are not, unless they own property, subject to the assessment. Residents pay no additional taxes as a result of living within the [district]."). Critical to the result in *Salyer* was the fact that "there is no way that the economic burdens of district operations can fall on residents *qua* residents." 410 U.S. at 729. The same cannot be said here, where OHA expends millions of dollars of general tax monies annually.

There is no support for the court of appeals' drastic expansion of *Salyer* or for the resulting narrowing of the Fifteenth Amendment's scope. Indeed, *Salyer* is entirely inapposite to application of the Fifteenth Amendment: *Salyer* is concerned only with a property-based exception to the Equal Protection Clause's one-person-one-vote rule, whereas the Fifteenth Amendment occupies the field of race-based restrictions on voting by prohibiting such restrictions outright. This Court's intervention is necessary to correct the Ninth Circuit's erroneous extension of *Salyer* and to reaffirm that the promise of the Fifteenth Amendment is not an empty one.

II. The Decision Below Conflicts With This Court's Decision In *Morton v. Mancari* By Holding That The "Special Relationship" Between The United States And Formally Recognized Indian Tribes Authorizes State-Sponsored Discrimination On The Basis Of Non-Tribal, Racial Classifications

In purporting to justify the racial classification at issue here on the basis of the "special relationship" recognized by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), the court below adopted a reading of *Mancari* that is inconsistent with that decision and that authorizes the wholesale evasion of this Court's recent Equal Protection Clause jurisprudence. In *Mancari*, the Court held that a "special relationship" exists between the United States and formally recognized Indian tribes by virtue of the Indian Commerce and Treaty Clauses, and accordingly concluded that a congressionally mandated hiring preference for tribal members employed by the Bureau of Indian Affairs (BIA) was a political rather than a racial preference and was subject only to rational basis review. *Id.* at 533-34, 535 n.24. By contrast, the court below held that rational basis review applies whenever the classification at issue reflects a "trust" relationship between a State and an identifiable class, even if the classification at issue is explicitly racial rather than political and even if the benefited racial group is not recognized as a quasi-sovereign tribe. That holding is impossible to reconcile with *Mancari*.

A. The *Mancari* "Special Relationship" Turns On Recognized Tribal Membership, Not Merely A Declared Trust Relationship

In direct contrast to the approach followed below, this Court in *Mancari* carefully distinguished between "Indian tribes" as a political classification and "Indians" as a racial classification, making clear that the "special relationship" is limited to the former and that classifications based on Indians as a purely racial designation

would be subject to the same exacting scrutiny as any other racial classification. Thus, the BIA hiring preference at issue in *Mancari* was subject to rational basis review only because it applied "to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." 417 U.S. at 554. BIA's policy was "not directed towards a 'racial' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes." *Id.* at 553 n.24. The Court emphasized that the requirement of tribal membership "operates to exclude many individuals who are racially to be classified as 'Indians,'" and, as a result, "the preference is political rather than racial in nature." *Id.*

Subsequent cases confirm that the existence of a formally recognized tribal government is the defining characteristic of this "special relationship." *See, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (upholding delegation of authority to tribes because "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" and because "they are 'a separate people' possessing 'the power of regulating their internal and social relations'") (citations omitted); *Fischer v. District Court*, 424 U.S. 382, 390 (1976) (exclusive jurisdiction of tribal court was not impermissible racial discrimination because "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law"); *United States v. Antelope*, 430 U.S. 641, 645-46 (1977) ("Federal legislation with respect to *Indian tribes*, although relating to Indians as such, is not based upon impermissible racial classifications," but is "rooted in the unique status of Indians as 'a separate people' with their own political institutions.") (emphasis added); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of *Indian tribes* under federal law' permits the Federal

Government to enact legislation singling out *tribal Indians*, legislation that might otherwise be constitutionally offensive.") (citation omitted; emphasis added).

Mancari and its progeny trace the authority for the "special relationship" to the Indian Commerce and Treaty Clauses of the Constitution. *Mancari*, 417 U.S. at 551-52. The Court has grounded the special relationship primarily in the Indian Commerce Clause, which gives Congress the power to regulate commerce "with the *Indian Tribes*," not with Indians generally. U.S. Const. art. I, § 7 (emphasis added).[7] Given these essential constitutional underpinnings of the "special relationship," it is plain that that relationship does not and cannot extend beyond formally recognized Indian tribes. *See generally* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996).

As the court of appeals correctly conceded, racial "Hawaiians" "aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution." App., *infra*, 14a. Thus, the court of appeals' decision is squarely inconsistent with *Mancari* and its progeny, because it simply ignores the key limiting factors of those decisions -- the presence of a quasi-sovereign Indian tribe with which Congress enjoys a constitutionally mandated "special relationship," and the presence of a tribal (as opposed to a purely racial) classification.

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[7] The second constitutional underpinning for the "special relationship," the Treaty Clause, confirms that the doctrine is limited to quasi-sovereign tribal entities. *See Mancari*, 417 U.S. at 552 (Treaty Clause "has often been the source of the Government's power to deal with Indian tribes"); *see also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("[F]ederal authority over Indian matters . . . derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

Unlike the tribal membership classification upheld in *Mancari*, the blood quantum requirement at issue in this case is a blatant racial distinction unconnected to any membership in a quasi-sovereign Indian tribe. As a result, the court of appeals' reliance on *Mancari* to uphold this explicitly racial restriction is in direct conflict with *Mancari* and its progeny.[8]

B. The Decision Below Conflicts With This Court's Decision in *Washington v. Yakima Indian Nation*

In addition to violating the principles announced in *Mancari*, the court of appeals' opinion directly conflicts with this Court's decision in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), which held that the *Mancari* "special relationship" does not apply to the States. *Id.* at 500-01 ("'[T]he unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians . . . . *States do not enjoy this same unique relationship with Indians.*") (quoting *Mancari*, 417 U.S. at 551-52) (emphasis added). At issue in *Yakima Nation* was the State of Washington's legislative assumption of civil and criminal jurisdiction over Indians and Indian territory within the State. The Court made clear that *Mancari*'s "special relationship" does not apply to the States, but upheld Washington's assumption of jurisdiction because "[i]t was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over

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8 If *Mancari* could be read in the manner adopted by the court below, it would be irreconcilable with this Court's more recent Equal Protection Clause jurisprudence, particularly *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and would have to be overruled. *See, e.g., Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997) (questioning whether *Mancari* survives *Adarand*).

Indians." *Id.* at 501. Thus, because "Washington was legislating under explicit authority granted by Congress" in the exercise of Congress's "plenary power over Indian affairs," Washington's actions fell within the "special relationship," and the State's classification based on tribal status was subject only to rational basis review. *Id.*

Congress has granted no such "explicit authority" to Hawaii to restrict the right to vote in OHA elections to racial "Hawaiians." Indeed, as described above, nothing in the Hawaii Admission Act even sets aside any portion of the ceded lands trust exclusively for "native Hawaiians" (*see* Hawaii Admission Act § 5(f)), and Congress has never authorized racially segregated voting in OHA elections. Moreover, even if the Act could be construed to support the notion of a trust relationship, it is expressly limited to "native Hawaiians," *i.e.*, descendants of pre-1778 races that satisfy the 50 percent blood quantum requirement. The Act does not even address, let alone authorize, the much broader racial classification of "Hawaiians." Accordingly, the court of appeals' holding that the racial voting restriction for OHA elections is justified by the *Mancari* "special relationship" is flatly inconsistent with *Yakima Nation*'s holding that the "special relationship" does not apply to the States. Review by this Court is warranted to correct this erroneous and significant expansion of *Mancari*.

III. The Court Of Appeals' Decision Conflicts With, And Threatens Substantially To Undermine, This Court's Decisions In *Croson* And *Adarand*

A. The Decision Below Violates This Court's Precedents By Holding That Rational Basis Review Applies To An Explicit Race-Based Classification Adopted By A State

The court below correctly recognized that the OHA election laws establish a facially race-based classification. App., *infra*, 11a. Rather than examine those laws

under the strict scrutiny mandated by this Court, however, the court of appeals applied its broad new "trust relationship" exception to eviscerate this Court's pronouncements in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The glaring inconsistency between the decision below and the pronouncements of this Court demands immediate resolution.

As this Court has repeatedly held, the Equal Protection Clause is uncompromising in its requirement that courts must apply strict judicial scrutiny to all race-based legislation: "[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227; *accord Croson*, 488 U.S. at 496-97; *Shaw v. Reno*, 509 U.S. 630, 644 (1993). "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. Indeed, "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw*, 509 U.S. at 642. On these fundamental questions, this Court has appropriately left no room for debate.

Moreover, both *Adarand* and *Croson* make clear that classifications based solely on race are subject to strict scrutiny *regardless* of the particular race(s) involved. Significantly, both cases involved programs that included Native Americans (defined racially, without reference to tribal affiliation) among the enumerated beneficiaries. *See Adarand*, 515 U.S. at 205 (program benefiting "'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities'") (emphasis added; citation omitted); *Croson* 488 U.S. at 478 (program benefiting "'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts'") (emphasis added; citation omitted). In both cases, this Court treated the legislative classifications (including

those involving Indians) as purely racial in nature, and applied strict scrutiny to *all* of them. In *Croson*, for example, the Court referred to the benefited classes other than African Americans (including Indians) as "racial groups" and concluded that they could not survive strict scrutiny, because "there is absolutely no evidence of past discrimination against . . . Indian . . . persons in any aspect of the city's construction industry." *Id.* at 506. *Croson* thus confirms that *Mancari*'s rational basis test is inapplicable to non-tribal classifications of Native Americans and other racial groups -- including "native Hawaiians" and "Hawaiians."

After the Ninth Circuit's decision in this case, however, in which the court concluded that the existence of a legislatively declared "trust relationship" converts a racial preference subject to strict scrutiny into a merely political or legal classification subject to rational basis review, any legislature can, merely by adding the magic words "trust relationship" to a statute, shield race-based legislation from the strict scrutiny mandated by *Croson* and *Adarand*. As Justice Frankfurter warned, when faced with a similarly pernicious attempt to circumvent the Fourteenth and Fifteenth Amendments, "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (internal quotation marks and citation omitted). For this reason, this Court's review is essential.

B. The Court Of Appeals' Alternative Holding That Hawaii's Race-Based Voting Requirement Satisfies Strict Scrutiny Is Irreconcilable With Precedent

The court of appeals concluded its opinion with a brief and conclusory pronouncement that the OHA election scheme could survive even strict scrutiny. The court reasoned that "the scheme for electing [OHA] trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on

voter eligibility is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" App., *infra*, 17a (quoting 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644). The court's holding in this regard is inconsistent with the jurisprudence of this Court.

1. The only compelling interest that this Court has found sufficient to justify race-based laws is the need to remedy present discrimination or the present effects of past discrimination. *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 496-97. Nothing in the record demonstrates the existence of past or present discrimination so as to justify race-conscious remedies here, nor did the courts below purport to rest their decisions on that ground. This glaring absence is sufficient in itself to demonstrate that Hawaii's racial voting scheme cannot survive strict scrutiny. *Croson*, 488 U.S. at 505-06.

The court of appeals, however, identified two other interests that it viewed as compelling: (1) the responsibility to honor the "trust," and (2) the "perceived value" of a board "'chosen from among those who are interested parties.'" App., *infra*, 17a. Neither of these purportedly "compelling" interests suffices to justify a racial classification under this Court's precedents. The first falls short because it is predicated on a fallacy -- that the State is somehow compelled to administer its public trust lands in a manner that differentiates away Hawaiian citizens on the basis of race. Simply put, there is nothing in either the terms of the Hawaii Admission Act or in the practices of the State of Hawaii prior to 1978 that requires that approach. To the contrary, the Act spelled out five possible uses for the lands it granted to the State, without providing that *any* portion of the trust lands must be set aside exclusively for the benefit of "native Hawaiians" or for any other of the possible

uses. *See* Hawaii Admission Act § 5(f), 73 Stat. 4 (1959) ("Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide."). Indeed, from 1959 to 1978, the State administered these lands in a race-neutral manner, allocating them principally to the support of public education. App., *infra*, 5a; 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

Thus, against the backdrop of the race-neutral administration of these trust funds from 1959 to 1978, the court below and respondent have, in effect, taken the position that the State of Hawaii has a compelling interest in engaging in racial discrimination today in order to make up for even-handed treatment of all Hawaiian citizens, regardless of race, in the past. A more bizarre and disturbing interpretation of the Equal Protection Clause is difficult to imagine.

The second presumed interest -- the "perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles'" (App., *infra*, 17a) -- is clearly invalid as well. The proposition that only members of a particular race are well situated to make government policy decisions affecting that race's enjoyment of publicly managed funds finds no support in this Court's jurisprudence and is irreconcilable with the basic premise of the Equal Protection Clause, which is that all citizens, *regardless* of race, have equal rights before the law and an equal opportunity to participate in the governmental decision-making process. Indeed, the Ninth Circuit's recognition of this purportedly "compelling" interest effectively reinvigorates the patently offensive notion, previously put to rest by this Court, that it is legitimate for States to categorize voters based on racial stereotypes. *Cf. Shaw*, 509 U.S. at 647 ("It reinforces the perception that members of the same racial group . . . think alike, share the

same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.").

Even in cases involving *privately* established racially discriminatory trusts, which in and of themselves do not run afoul of the Equal Protection Clause, this Court has made clear that a State has no legitimate interest in furthering or administering such a trust. *See Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230 (1957) (state agency violated the Fourteenth Amendment by enforcing racially discriminatory terms of will); *Evans v. Newton*, 382 U.S. 296 (1966) (Fourteenth Amendment forbids city from honoring racially discriminatory provision of private trust creating whites-only park). By the same token, Hawaii cannot possibly be deemed to have a legitimate, let alone compelling, interest in advancing the cause of racial segregation by limiting the right to vote for state officials to members of a particular racial group.

2. Equally problematic is the court of appeals' holding that Hawaii's race-based voting scheme "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties' would be the best way to insure proper management and adherence to the needed fiduciary principles." App., *infra*, 17a. In the first place, that holding conflicts with *Croson*, which held that racial classifications are not narrowly tailored to the attainment of a compelling governmental interest unless the government has previously "carefully examined and rejected race-neutral alternatives" to attain the same end. *Croson*, 488 U.S. at 507. In direct contrast with *Croson*, the court below did not identify or require "any consideration of the use of race-neutral means" (*id.*) to achieve the putative compelling interest of "insur[ing] proper management and adherence to the needed fiduciary principles," nor did it make any effort to explain why that goal could not be achieved through race-neutral means. Given that

ensuring "proper management" and "adherence to . . . fiduciary principles" are goals that OHA shares with innumerable organizations whose leadership is selected by race-neutral means, the court's failure to examine these alternatives is a particularly glaring departure from the approach mandated by this Court in *Croson*.

Even if race-conscious means could be justified in these circumstances, moreover, the OHA voting scheme could not satisfy the narrow tailoring requirement under *Croson*, because it does not achieve the purportedly "compelling" goal identified by the court below: ensuring that "the beneficiaries [are] the same as the voters," App., *infra*, at 17a. As it stands, the majority of OHA-qualified voters -- those racial "Hawaiians" who fail to satisfy the 50 percent blood quantum required to be "native" -- are not in fact beneficiaries of the bulk of OHA's funds. Racial "Hawaiians" with less than 50 percent Hawaiian blood have no rights to the publicly held ceded lands that (by virtue of state law) have been set aside for the exclusive benefit of the more racially pure "native Hawaiians."[9] As in *Croson*, therefore, this racial restriction is significantly overbroad in view of its stated goal, and it therefore fails the narrow tailoring requirement as well. *See Croson*, 488 U.S. at 506.

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[9] According to OHA's own figures, only approximately 39 percent of racial "Hawaiians" (80,953 out of 208,476) pass the 50 percent blood quantum requirement. Native Hawaiian Data Book 1998, table 1.14. In contrast, for the last five years for which figures are available, annual legislative appropriations for OHA (which may be spent to benefit all racial "Hawaiians") have totaled $17,735,147, whereas annual proceeds from the ceded land trust (which benefit "native Hawaiians") have totaled $133,989,270. OHA Biennial Reports, 1993-1994 to 1996-1997.

C. The Decision Below Conflicts With This Court's Equal Protection Jurisprudence By Creating A New Presumption Of Constitutionality To Shelter Race-Based Laws From Challenge

In yet another departure from this Court's equal protection jurisprudence, the court of appeals created a broad new presumption of constitutionality for government-sponsored racial classifications, and announced the hitherto unknown proposition that one racial classification justifies another round of state-sponsored discrimination. These troubling and dangerous new rules of constitutional law are inconsistent with this Court's case law and compel review by this Court.

According to the Ninth Circuit, when a party challenges the constitutionality of one portion of a state-sponsored network of racial classifications, all unchallenged aspects of that network of racial discrimination are subject to a conclusive presumption of constitutionality. App., *infra*, 9a. ("[T]he constitutionality of the racial classification that underlies the trusts and the OHA is not challenged in this case. This means that we must accept the trusts and their administrative structure as we find them, and assume that both are lawful."). The court of appeals cited no authority to support its creation of this new shield for state-sponsored racial discrimination, and there is none. To the contrary, this Court has consistently held that race-based laws are "presumptively unconstitutional," *Bush v. Vera*, 517 U.S. 952, 976 (1996) (internal punctuation omitted); *Shaw*, 509 U.S. at 642-43. The court of appeals' presumption of constitutionality for race-based legislative schemes is squarely inconsistent with these cases.

Compounding its error, the court of appeals relied on its improper presumption to conclude that the racial classification at issue in this case was justified by the unchallenged (and therefore presumptively constitutional) aspects of the OHA statutory scheme. App., *infra*, 9a-10a, 16a. Even leaving aside the improper nature of the presumption itself, this chain of reasoning is plainly impermissible, and is inconsistent with this Court's cases. Indeed, even where a particular form of racial classification is *permitted* by the Constitution (*i.e.*, in the case of private discrimination), this Court has made clear that States may not rely on the constitutionally permissible nature of that classification to engage in further state-sponsored race-conscious action.

In *Pennsylvania v. Board of Dirs. of City Trusts*, for example, this Court held that a state agency violated the Fourteenth Amendment when it enforced the racially discriminatory terms of a private will under which a orphanage for poor white males had been established. 353 U.S. at 231. Similarly, the Court in *Evans v. Newton*, prohibited the city of Macon, Georgia, from honoring a racially discriminatory provision of a will under which the city received a park that was to be used only by whites. 382 U.S. at 301-02. The Court based its decision on "the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as a trustee under a private will that serves the racial segregation cause." *Id.* at 298.

In both of these cases, the underlying discriminatory trust was privately created, and thus did not in itself violate the Constitution. But the Court nonetheless construed the Equal Protection Clause to preclude state actors from furthering that private discrimination in other ways. That interpretation is in direct tension with the approach followed below, under which a purportedly permissible racial classification justifies a further round of additional racial discrimination by state actors.

The Ninth Circuit's new approach to equal protection jurisprudence is a mandate for judicial toleration of racially discriminatory laws, and flies in the face of this Court's precedents. Further review is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Harold F. RICE, Plaintiff-Appellant,

v.

Benjamin J. CAYETANO, Governor of the State of Hawai'i; Mazi K. Hirono, Lieutenant Governor of the State of Hawai'i, Defendants-Appellees.

No. 97-16095

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 5, 1998.

Decided June 22, 1998.

Before JAMES R. BROWNING, BRUNETTI and RYMER, Circuit Judges.

RYMER, Circuit Judge.

Hawaii holds special elections for trustees of the Office of Hawaiian Affairs (OHA), who must be Hawaiian and who administer public trust funds set aside for the betterment of "native Hawaiians" and "Hawaiians," in which only people who meet the blood quantum requirement for "native Hawaiian" or "Hawaiian" may vote.[1] There is a long history behind

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[1] "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples hereafter have continued to reside in Hawaii," and "native Hawaiian" means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands

[Footnote continued on next page]

the use and structure of the public lands trust for the benefit of descendants of the original races inhabiting the Hawaiian Islands, none of which is challenged in this appeal. Rather, we must decide only whether Hawaii may limit those who vote in special trustee elections to those for whose benefit the trust was established.

Harold F. Rice, who is caucasian and not a beneficiary of the trusts administered by OHA's trustees, appeals the district court's summary judgment in favor of Benjamin J. Cayetano, Governor of Hawaii, upholding the voter qualification in a published opinion.[2] *Rice v. Cayetano*, 963 F. Supp. 1547 (D. Haw. 1997). We agree that the franchise for choosing trustees in special elections may be limited to Hawaiians, because Hawaiians are the only group with a stake in the trust and the funds that OHA trustees administer. They have the right to vote as such, not just because they are Hawaiian. For this reason, neither the Fifteenth

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[Footnote continued from previous page]

previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10-2.

2 A brief in support of the state's position was submitted by amici curiae Office of Hawaiian Affairs, State Council of Hawaiian Homestead Associations, Kamehameha Schools/Bishop Estate, Na Pua A Ke Ahi Pauahi, Inc., Association of Hawaiian Civic Clubs, Council of Hawaiian Organizations, Native Hawaiian Bar Association, Native Hawaiian Legal Corporation, Native Hawaiian Advisory Council, Ha Hawaii, Hui Kalai'aina, and Alu Like, Inc.

Amendment nor the Equal Protection Clause precludes Hawaii from restricting the voting for trustees to Hawaiians and excluding all others.

Therefore, as we have jurisdiction under 28 U.S.C. § 1291, we affirm.[3]

I

A

Some history is helpful by way of background.[4]

Hawaii was an independent kingdom from 1810 until 1893 when it was overthrown and replaced by a provisional government (the Republic of Hawaii) that sought annexation to the United States. The United

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3 Although neither party addresses standing, it is a threshold question that we must consider even if not raised in the district court or on appeal. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *McMichael v. County of Napa*, 709 F.2d 1268, 1269 (9th Cir. 1983). While Rice may have only a generalized interest in the affairs of OHA and its trustees, he appears to be an adequately injured party as a caucasian resident of Hawaii who allegedly is denied the right to vote on racial grounds in a statewide election. *See, e.g., Baker v. Carr*, 369 U.S. 186, 206-08, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (asserted injury to fundamental right to vote deemed a sufficient personal stake to support standing).

4 We realize that the historical facts are not without controversy or complexity. We can't begin to set them all out, nor can we even be sure that every fact we recite is not misleading without further explanation. However, this appeal does not turn on any single historical fact, and our intention is simply to recite enough history to give context to the dispute that we do have to decide.

States accepted the cession of sovereignty of Hawaii in the Annexation Act of 1898. 30 Stat. 750 (1898). As a result, roughly 1,800,000 acres of crown, government, and public lands were ceded to the United States. The Annexation Act provided, however, that all revenues from the public lands were to "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* The Organic Act, passed in 1900, established the Territory of Hawaii and confirmed that the public lands ceded to the United States would remain in the possession of the government of the Territory for public works and other public purposes. Organic Act § 91, 31 Stat. 141 (1900), reprinted in, 1 Haw. Rev. Stat. at 84 (1993).

In 1920, the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921), *reprinted in*, 1 Haw. Rev. Stat. at 191 (1993), set aside some 200,000 acres of public lands as "available lands" for nominal price leases to "native Hawaiians. HHCA § 203. The term "native Hawaiian" was defined to mean "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7). HHCA responded to the fact that the number of full-blooded Hawaiians was decreasing and that the Hawaiian race required rehabilitation by being returned to the land. H.R. Rep. No. 839, 66th Cong., 2nd Sess. at 4 (1920). Accordingly, it specified that the trust was to be administered on behalf of the native Hawaiian beneficiaries of the Act. HHCA § 101(c).

Hawaii was admitted to the union as a state in 1959. Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, *reprinted in*, 1 Haw. Rev. Stat. at 90 (1993). In connection with admission, Hawaii agreed as a compact with the United States to adopt the HHCA, including its definition of native Hawaiians, as part of the state Constitution. Admission Act § 4. Article XII, § 1 of the Hawaii Constitution accomplished this. Further, the Admission Act provided that public lands held by the

United States that were granted or conveyed to Hawaii pursuant to § 5(b) were to be held by Hawaii as a public trust for five purposes, one of which is "the betterment of the conditions of native Hawaiians."[5] Admission Act § 5(f). The other four purposes pertain to the public generally.[6]

As it happens, no benefits actually went to native Hawaiians until the state constitution was amended in 1978 to establish the Office of Hawaiian Affairs. OHA was created to hold title to § 5(b) property (except for HHCA "available lands," which are separately administered by the Department of Hawaiian Home Lands) in trust and manage it for native Hawaiians and

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5 Section 5(f) provides that the lands granted to the State of Hawaii by the Admission Act, together with proceeds and income,

> shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Admission Act, § 5(f).

6 In accordance with the Admission Act, the Hawaii Constitution declared that "[t]he lands granted to the State of Hawaii by Section 5(b) of the Admission Act ... excluding therefrom lands defined as 'available lands' by ... the [HHCA] ... shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4.

Hawaiians.[7] Haw. Const. art. XII, § 5. OHA administers for native Hawaiians a pro rata share (now twenty per cent) of the public lands trust that was created under § 5(f) of the Admission Act.[8] *See* Haw. Con. art. XII, §§ 4, 6; Haw. Rev. Stat. §§ 10-3(1), 10-13.5. It also administers appropriated funds for Hawaiians. Haw. Rev. Stat. § 10-3(2). Pursuant to the constitution and statutes enacted to implement it, OHA is governed by a board of trustees whose members must be Hawaiian and who are elected in special elections by qualified voters who are Hawaiian. Haw. Rev. Stat. §§ 13D-1, 13D-2, 13D-3(b)(1), 13D-4.

B

Rice was born and has always lived in Hawaii. While he traces his ancestry to two members of the legislature of the Kingdom of Hawaii, prior to the Revolution of 1893, Rice is caucasian and is not within the statutory definition of Hawaiian or native Hawaiian. *See* Haw. Rev. Stat. § 10-2.

In March 1996, Rice applied to vote in the August 1996 election for trustees of OHA. The registration form contained the following declaration: "I am also

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7 The purposes of OHA are the betterment of conditions of native Hawaiians and Hawaiians, serving as the principal agency responsible for the performance, development, and coordination of programs for native Hawaiians and Hawaiians, assessing policies of other agencies impacting on native Hawaiians and Hawaiians, and applying for, receiving, and disbursing grants for native Hawaiian and Hawaiian programs and services. Haw. Rev. Stat. § 10-3.

8 The other four purposes for the § 5(f) trust have no allocated pro rata percentage, nor is the remaining revenue administered by OHA.

Hawaiian and desire to register to vote in OHA elections." Rice crossed off the phrase "am also Hawaiian and" and marked "yes" on the application. He is otherwise a qualified voter, but his application was denied since he is not Hawaiian.

Rice brought this action pursuant to 42 U.S.C. § 1983 challenging his exclusion from voting for OHA trustees on the grounds that conditioning eligibility on being Hawaiian violates the Voting Rights Act of 1965 as amended (42 U.S.C. §§ 1971 *et seq.*),[9] 42 U.S.C. § 1981, and the Fourteenth and Fifteenth Amendments of the United States Constitution. The district court concluded that the method of electing OHA trustees meets constitutional standards for the essential reason that the restriction on the right to vote is not based upon race, but upon a recognition of the unique status of native Hawaiians that bears a rational connection to Hawaii's trust obligations. In any event, the court noted, OHA performs no truly governmental functions and "is carefully constrained by its overall purpose to work for the betterment of Hawaiians." 963 F. Supp. at 1558. Having already disposed of other claims, the court entered summary judgment. Rice timely appealed.

II

Rice complains about the "extraordinary" authority and discretion that OHA, which is a state agency, is given to provide government services to a segment of the population defined exclusively by race, funded by a twenty percent share of revenues from the public lands trust which may lawfully be applied for the benefit of all people of the state without regard to race, and run by

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9 Rice has abandoned his claims under the Voting Rights Act and § 1981.

trustees who are voted into office by an electorate apportioned on a purely racial basis. He submits that the racial restriction on the right to vote violates the Fifteenth Amendment because it conditions the right to vote in statewide elections for trustees on membership in the Hawaiian race. It violates the Fourteenth Amendment, according to Rice, because this classification by race, and the corresponding racial restriction on the franchise, fails the test of strict scrutiny which must be applied to all distinctions based on race under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). And, he contends for the first time on appeal, it also violates the anti-nobility prohibitions of the United States Constitution because it establishes immutable classes among citizens, giving some greater entitlement to political power than others, based solely on birth and ancestry.

Hawaii, on the other hand, emphasizes that neither the definition of native Hawaiians or Hawaiians, nor the designation of specific public lands for their benefit, nor OHA, nor its purposes, is at issue. That being so, it contends, the limitation of the right to vote for OHA trustees to Hawaiians and native Hawaiians is not a racial classification, but a legal one based on who are beneficiaries of the trusts in a special purpose, disproportionate impact election of the sort described in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). In any event, Hawaii points out, it did not intentionally discriminate on the basis of race because the genesis of the whole structure was Congress's requirement that the new state of Hawaii accept the definition of native Hawaiian in the HHCA and accede to the purposes of the § 5(f) trust which include, in part, betterment of the conditions of native Hawaiians. Finally, the state submits, its classification survives rational basis review (which is the appropriate standard) under *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474,

41 L. Ed. 2d 290 (1974), because the federal government and the state of Hawaii have the same special relationship with and owe the same unique obligation to native Hawaiians as the federal government does to Indian tribes.

Rice counters Hawaii's argument that the right to vote merely reflects the legal status of native Hawaiians and Hawaiians by pointing out that the legal status of being a beneficiary of the OHA trusts is based only on race. That may be so, but the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case.[10] This means that we must accept the trusts and their administrative structure as we find them, and assume that both are lawful.[11]

If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or

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10 In this connection, we note that the scholarly work upon which Rice relies–and others that we nave read–focuses on the underlying arrangement and its constitutionality, not on the voting rights provision at issue here. *See* Stuart M. Benjamin, *Equal Protection and the Special Relationship*, 106 Yale L.J. 537 (1996); *see also* Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L. Rev. 63 (1985).

11 We express no opinion on the constitutionality of the underlying trust structure, or of OHA's purposes, because we are not called upon to determine the constitutionality of any of the racial classifications in the HHCA or the Admission Act or the Hawaii Constitution or the statutes establishing OHA–except for the one provision in Article XII, Section 5 of the Constitution and Haw. Rev. Stat. § 13D-3, limiting the right to vote for OHA trustees, that are directly challenged here.

appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty,[12] should be the group to decide who the trustees ought to be. Put another way, the voting restriction is not primarily racial, but legal or political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

A

Specifically with respect to the Fifteenth Amendment,[13] Rice maintains that Hawaii has created a racially pure voting bloc which states cannot do for any reason under *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). Moreover, he points out, the Fifteenth Amendment is self-executing and absolute on its face. Since the voter qualification is expressly racial, and absolutely denies the right to vote to all races except the Hawaiian race, Rice contends that it violates the plain meaning of the Fifteenth Amendment without need for farther inquiry. *Shaw v.*

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12 Haw. Rev. Stat. § 10-16(c), for example, provides that "[i]n matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office."

13 The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

Rice is, of course, quite right that the Hawaii Constitution and Haw. Rev. Stat. § 13D-3 contain a racial classification on their face. The Hawaii Constitution provides in Article XII, section 5: "There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law." And § 13D-3, implementing it, provides that: "No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian." Haw. Rev. Stat. § 13D-3(b).

Yet restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for. As the district court explained in detail, 963 F. Supp. at 1556-57, the vote is for the limited purpose of electing trustees who have no general governmental powers and perform no general governmental purposes.[14] The

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14 OHA trustees have power to manage proceeds and income from whatever source for native Hawaiians and Hawaiians, including § 5(f) revenue; to exercise control over property set aside to OHA for native Hawaiians and Hawaiians; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs. Haw. Rev. Stat. § 10-5. The duties of the board are similarly channeled. They are to develop a master plan for native Hawaiians and Hawaiians; to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services; to maintain an inventory of, and act as clearinghouse for,

[Footnote continued on next page]

voting restriction itself applies only at a special election to elect members of the OHA board;[15] in general elections, all persons generally qualified to vote may vote. In these respects the trustee elections are like the special purpose elections upheld in *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973) and *Ball v. James*, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981). In both cases, the system for electing directors of special purpose water districts limited voting eligibility to landowners on a proportional basis, excluding others in the district. The Court concluded that by virtue of their limited purpose, including the districts' lack of normal governmental authority, and the disproportionate effect of their activities on landowners as a group, the districts' electoral scheme comported with the Fourteenth Amendment and did not run afoul of the popular election requirements set out in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Thus, elections may be held for special purposes and voter qualifications that might otherwise be invalid may survive when they limit eligible voters to those who are disproportionately affected and the government agency does not perform fundamentally governmental functions.

[Footnote continued from previous page]

programs for native Hawaiians and Hawaiians; to keep other agencies informed about native Hawaiian and Hawaiian programs; and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians. Haw. Rev. Stat. § 10-6.

15 Section 13D-4 provides that "[m]embers of the board of trustees shall be elected at a special election held in conjunction with the general election in every even-numbered year." Haw. Rev. Stat. § 13D-4.

Rice nevertheless asks us to dismiss the *Salyer* rationale entirely on account of OHA's authority over funds that include a twenty percent share of revenues from the ceded lands trust; the similarity between what OHA does for its beneficiaries and what the state otherwise does generally for all citizens without regard to race; and the fact that OHA activities are of vital concern to all citizens of Hawaii. But we cannot set *Salyer* aside altogether, for Rice's points reflect frustration with OHA–which is something we can do nothing about in this case. Whether or not the frustration–or OHA–is justified, the fact remains that public lands and funds have long since been committed in trust, and continue to be allocated in part, for the purpose of benefiting the Hawaiian peoples; they are the only peoples legally interested in how those funds are handled; and for them to decide who should administer the trust does not seem exceptionable under *Salyer* except for the fact, which we recognize, that the qualification has to do with race instead of ownership of land, as in *Salyer*. For this reason we do not regard *Salyer* as dispositive, but we cannot say that it has no applicability whatever.

Nor may we ignore the reality that the voting restriction for trustees is rooted in historical concern for the Hawaiian race, going back at least to the Hawaiian Homes Commission Act of 1920, carried through statehood when Hawaii acknowledged a trust obligation toward native Hawaiians as a condition of admission to the union, and on to 1993, when Congress passed a Joint Resolution "apologiz[ing] to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination." Pub. L. 103-150, 107 Stat. 1510 (1993). In this sense, the special treatment of Hawaiians and native Hawaiians reflected in establishment of trusts for their benefit, and the creation of OHA to administer

them, is similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). As we said of *Mancari* in *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), preferential treatment that is grounded in the government's unique obligation toward Indians is a political rather than a racial classification, even though racial criteria may be used in defining eligibility. *Id.* at 1168 n.10. While we recognize that *Mancari* is distinguishable because Hawaiians are not exactly like Indians (for example, they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution),[16] and we do not regard either *Mancari* or *Pierce* as controlling,[17] both indicate that we are not compelled to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it.

Accordingly, even though there is little authority to guide application of the Fifteenth Amendment in a case

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16 Rice makes the additional point that whatever the historic obligation may have been, it ran to "native Hawaiians" and not to persons of any Hawaiian ancestry as the OHA statute prescribes. Again, this may be so since the definition of beneficiaries was changed in the 1978 constitutional amendments to include "Hawaiians" as well as "native Hawaiians," but it is immaterial to this appeal because the underlying classification is not at issue.

17 Although we questioned *Mancari's* continuing vitality in light of *Adarand* in *Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997), and Rice believes *Adarand* trumps both, we are bound by Supreme Court authority and our own precedent until overruled, which neither *Mancari* nor *Pierce* has been.

such as this, we are persuaded that no violation exists. The Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote," Laurence H. Tribe, *American Constitutional Law*, at 335 n.2 (2d ed. 1988), and renders inoperative any provision of a state constitution that restricts the right to suffrage to members of a particular race, *see Neal v. Delaware*, 103 U.S. 370, 389, 26 L. Ed. 567 (1881), but this isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis. Further, the voter qualification at issue here–albeit clearly racial on its face–does not exclude those who ever had, now have, or ever can have any interest in the outcome of the special election for trustees (at least not unless and until the whole trust scheme and administrative structure is invalidated). Under these circumstances, to permit only Hawaiians to vote in special elections for trustees of a trust that we must presume was lawfully established for their benefit does not deny non-Hawaiians the right to vote in any meaningful sense. The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity. *Cf., e.g., Lane v. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 (1939) (striking down, under the Fifteenth Amendment, procedural hurdles to registering to vote in general elections); *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (state cannot set racial qualifications for primary because the right to vote in a primary is like the right to vote in a general election). Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs. *Cf., e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (gerrymandering city boundary to deny a vote to African-Americans who lived in the city and otherwise would have had the right to vote in municipal elections,

without any countervailing municipal function the scheme was designed to farther). Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and "a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles."[18] The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that Rice's right to vote has been denied or abridged in violation of the Fifteenth Amendment.

B

Regardless, Rice argues, the racial restriction on the right to vote for OHA trustees violates the Fourteenth Amendment[19] even if the Fifteenth Amendment isn't

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18 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because "people to whom assets belong should have control over them.... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." *Id.*

19 Section 1 of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

[Footnote continued on next page]

applicable. *Shaw* indicates that racial classifications on the face of a statute are immediately suspect, he emphasizes, and the classification here cannot survive for lack of any compelling justification under *Adarand*.

We obviously agree that there is a racial classification on the face of § 13D-3, and that it is suspect as such; but we disagree for the reasons we have already explained that it is primarily racial in context. Nor is the eligibility requirement, strictly speaking, a preference of the sort that concerned the Court in *Adarand*. Instead, it is more like the limitation of voting to landowners in *Salyer*. We have no trouble understanding why Hawaii would want the people who have an interest in the trust to vote for trustees, and it is rational for the state to make this decision in light of its trust responsibilities for Hawaiians and native Hawaiians. *See Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290; *Pierce*, 694 F.2d 1162. However, even if the voting restriction must be subjected to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there–which is not challenged in this appeal. Thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." 1 Proceedings of the Constitutional

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> deny to any person within its jurisdiction the equal protection of the laws.

Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644.

Given the fact that only Hawaiians and native Hawaiians are trust beneficiaries, there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition by blood quantum which makes the beneficiaries the same as the voters. We therefore conclude that because Hawaiians and native Hawaiians have the right to vote as such, not just because they are Hawaiian, that the Equal Protection Clause does not preclude Hawaii from restricting the voting for trustees to Hawaiians and excluding all others.

III

We decline to consider Rice's argument that the restriction on voting to descendants of pre-1778 inhabitants violates the Anti-Nobility Clauses of the United States Constitution because the issue is raised for the first time on appeal. *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978).

AFFIRMED.

Harold F. RICE, Plaintiff,

v.

Benjamin J. CAYETANO, Governor of the State of Hawai'i, Defendant.

CIV. No. 96-00390 DAE.

United States District Court, D. Hawai'i.

May 6, 1997.

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

DAVID ALAN EZRA, District Judge.

On February 26, 1997, Plaintiff Harold Rice filed for partial summary judgment on his remaining claim that the voting requirements for elections for the Trustees of the Office of Hawaiian Affairs violate the Constitution and the laws of the United States. On February 28, 1997, Defendant Benjamin Cayetano, Governor of the State of Hawaii, filed for partial summary judgment on the same issue. The court heard argument on these motions on April 28, 1997. John Goemans, Esq., appeared on behalf of Plaintiff; Deputy Attorney General Lynette Matsushima appeared on behalf of Defendant. After reviewing the motions and the supporting and opposing memoranda, the court DENIES Plaintiff's Motion for Partial Summary Judgment and GRANTS Defendant's Motion for Partial Summary Judgment.

BACKGROUND

Plaintiff Harold Rice ("Plaintiff") brought the instant action challenging his exclusion from voting for the Trustees of the Office of Hawaiian Affairs and from

voting in the Special Election ("Native Hawaiian Sovereignty Election") held August 1996. This court has previously addressed Plaintiff's challenge to his exclusion from participating in the Native Hawaiian Sovereignty Election. *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996).

The pertinent facts are undisputed. Plaintiff was born and currently lives in Hawaii as a citizen, taxpayer and qualified elector of the United States, the State of Hawaii, and the County of Hawaii. He traces his ancestry to two members of the legislature of the Kingdom of Hawaii, prior to the Revolution of 1893. Plaintiff, however, is Caucasian and is not within the definition of Hawaiian or Native Hawaiian.[1]

The Office of Hawaiian Affairs ("OHA") was established in 1978 by the Constitutional Convention and the voters of Hawaii for the purpose of establishing an office to address the needs of "the aboriginal class of people of Hawaii," as a means to satisfy the State's responsibility under the Admission Act to utilize the public lands trust for the betterment of Native

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[1] Hawaiians are defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HRS § 10-2. Native Hawaiians are defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Id.*

Hawaiians. HRS §§ 10-1, 10-3. OHA is funded partly by legislative appropriations and partly by a pro rata portion of the receipts from the public lands trust created by the Admission Act. HRS §§ 10-13, 10-13.5. OHA is governed by a board of trustees who must be Hawaiian. HRS § 13D-1. Only Hawaiians and Native Hawaiians may participate in the election for the OHA trustees. HRS § 13D-3.

In March 1996, Plaintiff applied to vote in the election for the Trustees of the Office of Hawaiian Affairs. The registration form contained the following declaration: "I am also Hawaiian and desire to register to vote in OHA elections." Plaintiff deleted the phrase "am also Hawaiian and" and marked "yes" on the application. Plaintiff's application was subsequently denied.

Plaintiff now seeks a declaration that this election premises the right to vote upon racial qualifications, and therefore violates the Fourteenth Amendment and the Fifteenth Amendment of the United States Constitution.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides for summary judgment when:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The movant bears the initial burden of "identifying ... those portions of the material on file that it believes demonstrates the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)). If

the movant has met its burden, then "the non-moving party must show that there are 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party.'" *California Architectural Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 698, 98 L. Ed. 2d 650 (1988). When the "evidence" produced by each side conflicts, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." Inferences from the facts, disputed and undisputed alike, must be drawn in the light most favorable to the opposing party. *T.W. Elec.*, 809 F.2d at 631. These genuine factual issues must be supported by significant probative evidence. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). Hence, the non-moving party may not stand on its pleadings or merely assert it will controvert the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Simple disagreement about a material issue of fact, therefore, no longer precludes the use of summary judgment. *California Architectural Bldg. Prod.*, 818 F.2d at 1468.

DISCUSSION

Plaintiff and Defendant each move for partial summary judgment on the issue of whether the election for the Board of Trustees of OHA violates the Fourteenth and Fifteenth Amendments by restricting the franchise to those of Hawaiian ancestry.[2]

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2 Plaintiff's Complaint only challenges the constitutionality of Article XII, § 5 of the State Constitution, (establishing OHA) and § 13D of the Hawaii Revised Statutes (specifying that

[Footnote continued on next page]

I. Restriction on Franchise

Plaintiff argues that the restriction on his right to vote is based purely on racial classifications and is therefore violative of the Fourteenth[3] and Fifteenth[4] Amendments. Plaintiff maintains that Native Hawaiians are a racial rather than political group. Moreover, Plaintiff contends that the United States Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) is not controlling because Native Hawaiians are not a recognized Indian tribe.

Defendant, on the other hand, relies heavily upon *Morton* as holding that legislation singling out aboriginal peoples for particularized treatment is evaluated using the rational basis test. Defendant argues that Native Hawaiians have a special relationship to the Federal Government which is similar to the historically unique relationship between mainland American Indian tribes and the Federal Government underlying the *Morton*

[Footnote continued from previous page]

persons entitled to vote in OHA election be Hawaiian) to the extent that he is excluded from voting. His Complaint does not specifically challenge the requirement that OHA Trustees be Hawaiian nor does it challenge the funding of OHA.

3 The Fourteenth Amendment provides in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

4 The Fifteenth Amendment provides in relevant part that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

decision. Consequently, Defendant maintains that although Native Hawaiians are not yet a federally recognized tribe or quasi-sovereign tribal entity, the rational basis test is properly applied to the instant situation because the franchise classification is not racial, but political.

In further support, Defendant notes that the Native Hawaiian community is one marked for rehabilitation and special consideration by Congress, *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161 (1982), that the State of Hawaii has a unique obligation to the Native Hawaiian population with fiduciary duties similar to those owed by the federal government to Native Americans, and that the State has a special responsibility to protect traditional rights of access to land for subsistence, cultural and religious purposes. Moreover, Defendant argues that Congress has indicated that Native Hawaiians have a special relationship with the Federal Government paralleling that with Native Americans by grouping Native Hawaiians with Native American groups for various special benefits programs.[5]

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5 Defendant notes the inclusion of Native Hawaiians in the Native American Programs Act of 1974 (42 U.S.C. § 2991 *et seq.*); the American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); the National Museum of the American Indian Act (20 U.S.C. § 80q *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*); the National Historic Preservation Act (16 U.S.C. § 470 *et seq.*) and the Native American Languages Act (25 U.S.C. § 2901 *et seq.*) and the promulgation of statutes for the benefit of Native Hawaiians exclusively, including the Native Hawaiian Education Act (20 U.S.C. § 7901 *et seq.*), the Native Hawaiian

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Finally, Defendant contends that the rational basis test has been met. Defendant declares that OHA ensures that Native Hawaiians will receive a direct beneficial interest from the public lands as intended by the Admission Act, thereby fulfilling the State's trust obligations and responsibilities to Native Hawaiians. Defendant maintains that limiting the franchise to those OHA's actions directly affected is rationally related to the governmental interest of fulfilling congressionally imposed trust obligations. Defendant additionally asserts that the interests of those disadvantaged by the classification is minimal.

A. Equal Protection

As a general matter, legislation based upon racial classifications is constitutionally suspect under the Equal Protection Clause and should be reviewed under strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The Supreme Court has held, however, in the context of Native American Indians, that seemingly race-conscious legislation is valid utilizing the less stringent, rational basis test. *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) (preferential fishing rights); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979) (burden of proof in property disputes); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) (immunity from state taxation); *Fisher v. District Court of Sixteenth*

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Health Care Improvement Act of 1992 (42 U.S.C. § 11701 *et seq.*), and the Hawaiian Homes Commission Act.

Judicial Dist., 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976) (adoption laws); *Antoine v. Washington*, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975) (preferential hunting rights).

B. *Morton v. Mancari*

In *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), the Supreme Court held that the employment preference for Indians in the Bureau of Indian Affairs did not constitute invidious racial discrimination, but was reasonable and rationally designed to further Indian self-government. In so holding, the Court recognized that "[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551, 94 S. Ct. at 2483. The "origin and nature of this special relationship" derived from the fact that

> 'in the exercise of war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation ...'

Id. at 552, 94 S. Ct. at 2483 (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715, 63 S. Ct. 920, 926, 87 L. Ed. 1094 (1943)). The Court then stated that "in this historical and legal context," Congress determined that proper fulfillment of its trust obligation required giving the Indians greater control over their own destinies, leading to the preference provision. *Id.* at 553, 94 S. Ct. at 2484.

Focusing on the fact that the preference provision was "an employment criterion reasonably designed to further the cause of Indian self government and to make the BIA more responsive to the needs of its constituent groups," and was applied not to Indians as a discrete racial group but as members of quasi-sovereign tribal entities whose lives were governed by the BIA in a unique fashion, the Court concluded that the preference provision was not a "racial preference." *Id.* at 553-54, 94 S. Ct. at 2484. The Court concluded that legislation singling out Indians for special treatment was valid as long as the special treatment could be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. *Id.* at 555, 94 S. Ct. at 2485.

C. Native Hawaiians

Hawaii was an independent kingdom recognized by the United States from 1826 until 1893. Apology Bill, Joint Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (November 23, 1993). In 1893, the monarchy was overthrown and replaced by a Provisional Government (which subsequently declared itself the Republic of Hawaii), which sought annexation to the United States. *Id.* In 1898, by the Newlands Resolution, Congress accepted the cession of the sovereignty of Hawaii and of 1,800,000 acres of lands. *Id.* In 1900, President McKinley signed the Organic Act that provided a government for the Territory of Hawaii and defined the political structure and powers of that government. *Id.*

In 1920, in response to the fact that the number of full-blooded Hawaiians was decreasing and that the race was "fast becoming a minority element" in Hawaii, Congress enacted the Hawaiian Homes Commission Act ("HHCA"). H.R. Rep. No. 839, 66th Cong., 2nd Sess. 2 (1920). The legislative history of the Act, containing testimony from the hearings, describes the Native Hawaiians as "our wards" and the Congress as "trustees." *Id.* at 4; *see Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d

1161, 1167 (1982). Moreover, testifying before the House Committee, Ex-Secretary of the Interior Franklin Lane described Native Hawaiians as

> a most lovable people, a kindly people, and a generous people. They have arts of their own which endear them to the people who visit the islands. It is not altogether the beauty of the islands that attracts people there. It is the spirit that they see and the old civilization that they meet. There is a thriftlessness among those people that is characteristic among peoples that are raised under a communist or feudal system. They do not know what the competitive system is and they will get rid of property that is given them ... Therefore, they should be given as close identification with their country *as is* possible and yet be protected against their own thriftlessness and against the predatory nature of those who wish to take the land from them, and who have in the past.

H.R. Rep. No. 839, 2 *Sess*. at 4. The HHCA set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of Native Hawaiians.

In 1959, Hawaii was admitted to the union as the 50th State. Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). In conjunction with admission, the State of Hawaii made a compact with the United States to adopt the HHCA as part of its state constitution. *Id.* § 4.

Section 5(b) of the Admission Act granted Hawaii "title to all the public lands and other public property within the boundaries of the State of Hawaii," including the "available lands" set out in the HHCA. *Id.* These lands granted under § 5(b) are to be held as a public trust for the following purposes: for the support of the public schools and other public educational institutions, for the betterment of the conditions of Native Hawaiians, as defined in the HHCA, for the development of farm and

home ownership, for the making of public improvements, and for the provision of lands for public use. *Id.* § 5(f).

In accordance with the Admission Act, Hawaii amended its constitution and declared that "[t]he lands granted to the State of Hawaii by section 5(b) of the Admission Act ... excluding therefrom lands defined as available lands' by ... the [HHCA] ... shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4.

In 1978, the state constitution was amended to create the Office of Hawaiian Affairs, to be funded with 20% of the proceeds from the public trust created under § 5(f) of the Admission Act and legislative allocations. Chapter 10 of the Hawaii Revised Statutes provides the duties and responsibilities of OHA, and Chapter 13 provides that OHA's Board of Trustees be Hawaiians voted on by Hawaiians.

D. Application

The cases following *Morton*[6] repeatedly focus upon the special relationship between the Indians and the federal Government, specifically the Government's "unique obligation" toward Indians. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 253, 105 S. Ct. 1245, 1261, 84 L. Ed. 2d 169 (1985); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n. 20, 99 S. Ct. 3055, 3068 n.20, 61 L. Ed. 2d 823 (1979); *Washington v.*

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6 In *Morton* itself, the Supreme Court stated "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555, 94 S. Ct. at 2485.

Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01, 99 S. Ct. 740, 761-62, 58 L. Ed. 2d 740 (1979); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85, 97 S. Ct. 911, 919, 51 L. Ed. 2d 173 (1977); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656, 96 S. Ct. 1793, 1797, 48 L. Ed. 2d 274 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480, 96 S. Ct. 1634, 1644-45, 48 L. Ed. 2d 96 (1976); *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34-35 (1st Cir. 1992); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1215 (5th Cir. 1991). In *Morton*, the Court stated that the origin of this relationship arises from the fact that the Indians were left helpless and dispossessed due to the United States' exercise of its war and treaty powers. 417 U.S. at 552, 94 S. Ct. at 2483-84.

Notably, almost identical expressions were used by Congress in describing the Native Hawaiians during committee discussion of the HHCA. H.R. Rep. No. 839, 66th Cong., 2nd Sess. 4 (1920); *see Ahuna*, 64 Haw. at 336, 640 P.2d at 1167. Section 5(f) of the Admission Act provides further evidence of this relationship; § 5(f) creates both a federal right enforceable under 42 U.S.C. § 1983, *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 739 F.2d 1467, 1472 (9th Cir. 1984) ("*Keaukaha II*"), and a trust obligation that constitutes a compact with the United States, *id. Price v. State of Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985). Further, unlike typical provisions of state law, the trust obligation imposed by § 5(f) is protected from amendment by the state legislature unless the United States has consented to those amendments. Admission Act § 4.

Once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. *United States v. Nice*, 241 U.S. 591, 598, 36 S. Ct. 696, 697-98,

60 L. Ed. 1192 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315, 31 S. Ct. 578, 586, 55 L. Ed. 738 (1911); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). Despite turning over to the State of Hawaii the lands held for the HHCA and in trust, Congress has not explicitly terminated its trust relationship. *See Keaukaha II*, 739 F.2d at 1472 (though state has responsibility to administer trust under Admission Act, trust obligation is rooted in federal law). The State of Hawaii still must receive Congressional approval for certain amendments to the HHCA. Admission Act § 4.

This court recognizes that Native Hawaiians have not and could not at this time receive formal recognition as an Indian tribe.[7] The court is also acutely aware of the

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[7] As noted in *Rice*, 941 F. Supp. at 1542 n.16, because the administrative procedures to obtain federal recognition excludes aboriginal peoples outside the continental United States, Native Hawaiians are precluded from applying for federal recognition through the acknowledgment process. The court additionally acknowledges that Native Hawaiians could not at this point demonstrate that they constitute an Indian tribe by common law definition first articulated in *Montoya v. United States*, 180 U.S. 261, 266, 36 Ct. Cl. 577, 21 S. Ct. 358, 359-60, 45 L. Ed. 521(1901). Under *Montoya*, a native group has proved sovereign tribal status if it establishes by a preponderance of the evidence that (1) it is a group of Indians of the same or similar race, (2) the group is united in a community, (3) the group is under one leadership or government, and (4) the group inhabits an area of some reasonable definition. *Id.* at 266, 21 S. Ct. at 359-60. A native group must also establish that it is the present day successor to the historic sovereign entity which exercised at least minimal

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fact that it is the exclusive province of Congress to confer "nationhood" status to the Native Hawaiians. But a careful review of the history of formal recognition supports the conclusion that the fact that Native Hawaiians are not at this time recognized tribes is not controlling for purposes of determining the proper standard of review.

Native Hawaiians were incorporated into the United States twenty years after the treaty making era with Native Americans was finished. 25 U.S.C. § 71; *see* William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 347 (1990) (hereinafter "Quinn") (definition of acknowledged Indian tribes prior to 1871 was essentially those with treaties). After 1871, Congress and the Bureau of Indian Affairs ("BIA") possessed the power to classify the Indian tribes with no treaty relations. Quinn at 347. It was not until 1934, however, in the Indian Reorganization Act, that the term "recognition" was used in a jurisdictional sense; only Indian tribes that were acknowledged would be provided with services and dealt with in trust relationships. *Id.* Moreover, it was not until the 1970's, after two circuit court cases conditioning important tribal rights on federal acknowledgment, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976) and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), that the number of petitions for federal acknowledgment rose dramatically, leading to the

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government functions. *Native Village of Tyonek v. Pucken*, 957 F.2d 631, 635 (9th Cir. 1992).

Department of Interior's decision to formalize the petition and acknowledgment process.

Throughout this entire process, Native Hawaiians were omitted from the acknowledgment system, perhaps in part because Native Hawaiians had already developed their own trust relationship with the Federal Government as demonstrated by the passage of the HHCA and because Native Hawaiians were not being excluded from beneficial legislation in the same manner as unacknowledged mainland United States Indian tribes.

The inclusion of Native Hawaiians in legislation promulgated primarily for the benefit of Native American Indians[8] and the promulgation of legislation solely for the benefit of Native Hawaiians[9] constitutes

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8 Native American Programs Act of 1974 (42 U.S.C. § 2991 *et seq.*); American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); National Museum of the American Indian Act (20 U.S.C. § 80q *et seq.*); Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*); National Historic Preservation Act (16 U.S.C. § 470 *et seq.*); the Native American Languages Act (25 U.S.C. § 2901 *et seq.*); the Indian Health Care Amendments of 1988 (25 U.S.C. § 1601 *et seq.*); 15 U.S.C. § 637a (Aid to Small Business); 20 U.S.C. § 1106b (Teacher Corps preferences); 38 U.S.C. § 3761 *et seq.* (Native American Veteran Housing Loan Pilot Program); 42 U.S.C. § 3011 (establishing Office for American Indian, Alaska Native, and Native Hawaiian Programs on Aging).

9 Congress has enacted numerous special provisions for the benefit of Native Hawaiians in the areas of health, education, labor, and housing. *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7901 *et seq.*; the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. § 11701 *et seq.*; 20 U.S.C. § 4441 (Program for Native Hawaiian and Alaska

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further compelling evidence of the continuing guardian-ward relationship between Native Hawaiians and the Federal Government. *See Heckman v. United States*, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820 (1912) (holding when the federal government enters into a treaty or enacts a statute on behalf of an Indian tribe, Government commits itself to a guardian ward relationship with that tribe); *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (same); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832) (same).

The *Morton* decision is premised upon the existence of a guardian-ward relationship, and the requirement that the indigenous people be part of a recognized tribe is important as evidence of this continuing relationship. *See Peyote Way Church*, 922 F.2d at 1215 ("[O]nly the constituencies of the quasi-sovereign nations over whom the federal government considers itself guardian enjoy the preference."). As discussed above, there is abundant evidence that the guardian-ward relationship existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawaii and Native Hawaiians. As it is the unique guardian-ward relationship that is paramount, not formal recognition, the court finds that *Morton* is equally applicable to Native Hawaiians as to formally recognized Native Americans. *See Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161 (1982) ("Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus

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Native Culture and Arts); 20 U.S.C. § 7118 (allotting money for drug and violence prevention programs); 42 U.S.C. § 254s (Native Hawaiian Health Scholarship); 42 U.S.C. § 3057 *et seq.* (Native Hawaiian Health Program).

dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."); *see also Naliielua v. Hawaii*, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) ("Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States.").

The court concludes that the requirements of the Fourteenth and Fifteenth Amendments are not violated because the restriction on the right to vote is not based upon race, but upon a recognition of the unique status of Native Hawaiians. This classification derives from the trust obligations owed and directed by Congress and the State of Hawaii. Consequently, the legislation will be upheld if it can be tied rationally to the fulfillment of the unique obligation to Native Hawaiians. *Morton*, 417 U.S. at 555, 94 S. Ct. at 2485.

E. Application of Rational Basis Test

Plaintiff argues that there is no rational connection between the State's faithful execution of its trust obligation to Native Hawaiians and the race of electors for OHA. In so arguing, Plaintiff contends that the trust established by the Admission Act is not a trust for Native Hawaiians exclusively because the statute merely lists the "betterment of the condition of native Hawaiians" as a permissible use of the ceded lands. Plaintiff maintains that instead, all the State's residents are beneficiaries of the entire trust. Finally, Plaintiff argues that supporting self-determination or self-government for Native Hawaiians is not a compelling state interest.

Defendant enumerates the following reasons as justification for the franchise restriction: (1) Hawaiians enjoy a unique status as Native Americans or aboriginal peoples and special legislation for them meets equal protection requirements under *Morton*, (2) restriction of the franchise allows Hawaiians greater access to participation in matters directly affecting them,

furthering the state's trust obligation toward the betterment of the conditions of Native Hawaiians, reducing the negative impact of having non-Hawaiians administer matters that affect programs and activities relating to Native Hawaiians and Hawaiians, and allowing a board of trustees chosen from among those who are directly interested parties in order to ensure proper management and adherence to the needed fiduciary principles, and (3) ceded lands and their proceeds are held in part for the benefit of Hawaiians.

The court has already discussed the obligations imposed upon the State of Hawaii by Congress in the Admission Act. The lands given to the State by § 5(b) of the Admission Act are held in public trust for five specified purposes. The State of Hawaii, to comply with its obligation to perform one of these five purposes, the betterment of Native Hawaiians, created OHA. OHA is given a 1/5 portion of the proceeds from the § 5(b) lands. OHA has authority to spend this money, as well as money received by legislative allocation and other sources, as it believes will fulfill the purpose. The State of Hawaii limited the electoral franchise to those who are to benefit from OHA's programs. This structure is rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians.

Finally, Plaintiff contends that the State of Hawaii may not create a tribe and invest it with powers of self-government. In support, Plaintiff cites *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S. Ct. 740, 761-62, 58 L. Ed. 2d 740 (1979), specifically that

> It is settled that the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians....

Plaintiff, however, has omitted the second half of this clause, where the Court concludes "but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians." *Id.* at 501, 99 S. Ct. at 761. Similarly, the creation of OHA and the pendent legislation providing qualifications for the office of Trustee and for voting were passed pursuant to the Admission Act.

Moreover, the creation of OHA did not create a "tribe" composed of Native Hawaiians, nor is OHA invested with powers of self-government outside of the Act. Moreover, as discussed in detail above, the State of Hawaii created OHA as a means to fulfill the obligation taken over from the federal government as part of the Admission Act. The State of Hawaii did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawaii merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians. This is clearly consistent with and pursuant to Congress' mandate and intent.

II. One Person/One Vote

Defendant argues further that because OHA was created for a specialized purpose and is vested with very limited governmental authority, the election for the board of trustees of OHA is a "special interest" election within the meaning of *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). Defendant concludes that restricting the franchise to those disproportionately affected by OHA's actions is constitutional because it is rationally related to the State's fulfillment of its unique obligations to Native Hawaiians and Hawaiians.

As discussed above, the limitation on the electoral franchise is not based upon race. The demands of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), however, do not apply exclusively to restrictions allegedly based upon race. Rather, *Reynolds, Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968), and *Hadley v. Junior College District*, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970) require strict adherence to the principle of one-person, one-vote in elections. Even in these cases, the Supreme Court has recognized that "there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds ... might not be required...." *Hadley*, 397 U.S. at 56, 90 S. Ct. at 795.

The Supreme Court found such a case in both *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973) and *Ball v. James*, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981). In *Salyer*, the Supreme Court upheld a voter qualification statute which restricted voting to landowners and apportioned voting power for directors of the water district upon the assessed valuation of the voting landowner's property. Although the district did exercise some governmental powers, such as the power to hire and fire workers, condemn private property, issue general obligation bonds, and contract for the construction of projects, the Court also noted that this authority was limited because the district's primary purpose was for the acquisition, storage and distribution of water. The Court further recognized that the financial burdens fell on the landowners in proportion to the benefits they received from the district, and that the district's actions therefore disproportionately affected the voting landowners. Based upon these circumstances, the Court applied the rational basis test and concluded that the restrictions were constitutional.

In *Ball*, the Court also upheld the constitutionality of an Arizona method of electing directors for an agricultural improvement and power district which limited voter eligibility to landowners and apportioned voting power based on acreage owned. The Court found that the district did not "exercise the sort of governmental powers that invoke the strict demands of *Reynolds*." *Id.* at 366, 101 S. Ct. at 1818. The Court further described the district's functions as "relatively narrow," noting that the district does not own, sell or buy water, or control the use of the stored water, but instead stores water, conserves it from loss, and delivers it through canals. *Id.* at 367, 101 S. Ct. at 1819. Finally, the Court concluded that the existence and size of the district's power business did not affect the legality of the voting scheme, noting that the provision of electricity is not a traditional element of government sovereignty and that nothing in the prior cases suggests that "the volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident of its narrow and primary governmental public function can, of its own weight, subject the entity to the one-person, one-vote requirement...." *Id.* at 370, 101 S. Ct. at 1820.

OHA has the statutory purpose to serve as the principal public agency responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians and Hawaiians, to assess the policies and practices of other agencies impacting on Native Hawaiians and Hawaiians, to conduct advocacy efforts for Native Hawaiians and Hawaiians, to apply for, receive, and disburse grants and donations for Native Hawaiian and Hawaiian programs and services, and to serve as a receptacle for reparations. HRS § 10-3. By statute, OHA is given the following powers: (1) to adopt, amend and repeal bylaws governing the conduct of its business and the performance of its powers and duties; (2) to acquire, to hold, maintain, use, operate, sell, lease any real, personal

or mixed, tangible or intangible property in such manner and to the extent necessary to carry out its purpose; (3) to determine the character of and the necessity for its obligations and expenditures; (4) to enter into and perform such contracts, leases, cooperative agreements; (5) to execute all instruments necessary or appropriate in the exercise of its powers; (6) to issue revenue bonds in such principal amounts as may be authorized by law to finance the cost of an office project as authorized by law; (7) to lend or otherwise apply the proceeds of the bonds issued for an office project; (8) to exercise any and all rights provided by law for entry and re-entry upon or to take possession of an office project; and (9) to take such actions as may be necessary or appropriate to carry out the powers conferred by law. HRS § 10-4.

By statute, the Board of Trustees has the power to manage OHA's financial affairs, formulate policy relating to the affairs of Native Hawaiians and Hawaiians, and provide grants and make available technical and financial assistance for Native Hawaiian and Hawaiian programs. HRS § 10-5. More specifically, Hawaii law specifies that the Board's general duties include developing, implementing and updating a comprehensive master plan for Native Hawaiians and Hawaiians, to assist in the development of state and county plans for Native Hawaiian and Hawaiian programs, to maintain an inventory of available federal, state, county and private programs for Native Hawaiians and Hawaiians, to advise federal, state, and county officials about Native Hawaiian and Hawaiian programs, to conduct research relating to Native Hawaiians and Hawaiians, to develop models for comprehensive Native Hawaiian and Hawaiian programs, to act as a clearinghouse for applications for federal or state assistance to carry out Native Hawaiian or Hawaiian programs, to apply for and administer any federal funds made available for Native Hawaiians and Hawaiians, and to promote and assist the establishment

of agencies to serve Native Hawaiians and Hawaiians. HRS § 10-6.

Plaintiff maintains that OHA provides nearly the entire range of social and governmental services provided by the State of Hawaii to all citizens to a select group defined by race. In support, Plaintiff refers to the OHA publication on its Internet site, "Working for the Betterment of a People." In this publication, OHA states that among its programs and services, it helps provide scholarships for students, loans for businesses, and houses for homesteaders, it advocates for Hawaiian water rights and supports legal efforts for Hawaiians to secure title to their land, speaks on behalf of Hawaiians in Congress, the State legislature, and city and county councils, it supports numerous cultural activities, and its health division works with other agencies to ensure that Hawaiian needs and values are taken into consideration when creating health policy.

In *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 109 S. Ct. 1433, 103 L. Ed. 2d 717 (1989), the Supreme Court held that New York City's Board of Estimate fell "comfortably within the category of governmental bodies whose 'powers are general enough and have sufficient impact throughout the district' to require that elections to the body comply with equal protection strictures." *Id.* at 696, 109 S. Ct. at 1439 (citations omitted). The Board of Estimate possessed fiscal responsibilities including calculating sewer and water rates, tax abatements, property taxes; managed all city property; fixed the salaries of those paid by city funds; and granted all city contracts. *Id.* at 696, 109 S. Ct. at 1439-40. The Court specifically noted that these powers were not shared by any other part of New York City government. *Id.* The Board additionally possessed considerable authority to formulate the City's budget. *Id.*

In *Ball*, the district had the statutory power to establish and enforce laws, rules and regulations to carry

on its business, to construct works for irrigation, drainage and power, to levy taxes upon real property within the district, to sell tax-exempt bonds, and to exercise the power of eminent domain. *See Smith v. Salt River Project Agricultural Improvement & Power Dist.*, 109 F.3d 586, 1997 WL 129035 (9th Cir. 1997). In determining that the district did not exercise the sort of governmental powers that invoke *Reynolds*, however, the Court noted

> The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services. In *Salyer*, we recognized that the powers to contract for and staff projects, to condemn property, and to issue bonds do not amount to such general governmental authority. 410 U.S. at 728 n.8 [93 S. Ct. at 1230 n.8]. And as recognized by the dissenting opinion in the companion case to *Salyer*, the power to levy and collect special assessments also does not create such general governmental authority. *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 749 [93 S. Ct. 1237, 1240, 35 L. Ed. 2d 675] (1973) (Douglas, J.).

Ball, 451 U.S. at 366 & n.11, 101 S. Ct. at 1818 & n.11.

Likewise, OHA does not and cannot impose taxes. It cannot enact laws, nor does it administer the normal functions of government. While OHA does participate in a limited way in the operation of schools, health, and welfare services for the specific benefit of Hawaiians and Native Hawaiians, it does not by any means control the provision of these services to the general population. OHA cannot issue bonds, unless specifically authorized by law to finance the cost of an office project as authorized by law. HRS § 10-4. Moreover, while OHA has broad discretion in the disbursement of its funds, it is

not unfettered; OHA is carefully constrained by its overall purpose to work for the betterment of Hawaiians.[10]

Under these facts, it is clear that OHA, and correspondingly the Board of Trustees, does not exercise the general governmental powers that invoke the demands of *Reynolds*, *Avery*, and *Hadley*.

CONCLUSION

For the reasons stated above, the court concludes that the method of electing OHA Trustees as presently provided by state law meets constitutional standards and therefore, the court DENIES Plaintiff's Motion for Partial Summary Judgment and GRANTS Defendant's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

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10 The Plaintiff makes much of the pronouncements of one or more elected Trustees. The court, however, must base its decision on the specific contours and limits of OHA's mandate and legal authority. To the extent the Trustees of OHA, or even the state legislature exceed these limits, they risk running afoul of federal law and constitutional boundaries. Such action would be subject to immediate challenge in the federal courts.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[August 20, 1998]

HAROLD F. RICE,	)	
	)	No. 97-16095
Plaintiff-Appellant,	)	
	)	D.C. No. CV-96-00390-DAE
v.	)	
	)	
BENJAMIN J. CAYETANO, Governor of the State of Hawaii; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii,	)	
	)	
Defendants-Appellees.	)	

Before: BROWNING, BRUNETTI, and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XII: HAWAIIAN AFFAIRS

* * *

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

POWERS OF BOARD OF TRUSTEES

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law; to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for

native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Pub. L. 86-3, 73 Stat. 4

HAWAII ADMISSION ACT

* * *

Section 5. ... (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

* * *

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provisions of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

HAWAII REVISED STATUTES

CHAPTER 10: OFFICE OF HAWAIIAN AFFAIRS

[§10-1] Declaration of purpose.

(a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

* * *

§10.2 Definitions. In this chapter, if not inconsistent with the context:

* * *

"Hawaiian" means any descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided

that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

* * *

§10.3 Purpose of the office. The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians;

(2) The betterment of conditions of Hawaiians

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations.

* * *

§10-4 Office of Hawaiian affairs; established; general powers. There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The

office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contacts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers; and

(6) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

* * *

[§10-6] General duties of the board.

(a) The general duties of the board shall be:

(1) To develop, implement, and continually update a comprehensive master plan for native Hawaiians and Hawaiians which shall include, but not be limited to, the following:

(A) Compilation of basic demographic data on native Hawaiians and Hawaiians;

(B) Identification of the physical, sociological, psychological, and economic needs of native Hawaiians and Hawaiians;

(C) Establishment of immediate and long-range goals pursuant to programs and services for native Hawaiians and Hawaiians;

(D) Establishment of priorities for program implementation and of alternatives for program implementation; and

(E) Organization of administrative and program structure, including the use of facilities and personnel;

(2) To assist in the development of state and county agency plans for native Hawaiian and Hawaiian programs and services;

(3) To maintain an inventory of federal, state, county, and private programs and services for Hawaiians and native Hawaiians and act as a clearinghouse and referral agency;

(4) To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians;

(5) To conduct, encourage, and maintain research relating to native Hawaiians and Hawaiians;

(6) To develop and review models for comprehensive native Hawaiian and Hawaiian programs;

(7) To act as a clearinghouse for applications for federal or state assistance to carry out native Hawaiian and Hawaiian programs or projects;

(8) To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians; and

(9) To promote and assist the establishment of agencies to serve native Hawaiians and Hawaiians.

(b) The board shall have any powers which may be necessary for the full and effective performance and discharge of the duties imposed by this chapter, and which may be necessary to fully and completely effectuate the purposes of this chapter.

* * *

§10-13.5 Use of public land trust proceeds. Twenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians.

* * *

§13D-3 Qualifications of voters; registration.

(a) Every person who registers as required by law shall be entitled to vote at any election of board members provided that the person shall have attained the age of eighteen years at the time of the election.

(b) No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications:

(1) The person is Hawaiian;

(2) The person has attained the age of eighteen years or will have attained such age within one year of the date of the next election of board members; and

(3) The person is otherwise qualified to register to vote in the State.